

No. 16-60261

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**ISS Facility Services, Incorporated.,
*Petitioner***

v.

**National Labor Relations Board,
*Respondent***

**PETITIONER’S REPLY IN SUPPORT OF MOTION
TO LIFT THE STAY AND GRANT SUMMARY REVERSAL**

TO THE HONORABLE COURT OF APPEALS:

Summary reversal is appropriate because the Board’s order against ISS contradicts settled Fifth Circuit precedent. The Board does not dispute this fact in its opposition. Instead, the Board seeks only to delay the inevitable outcome in this case based on the *possibility* that the law could change in a hypothetical Supreme Court review of another case. That argument should be rejected and has been rejected by this Court in a growing number of cases granting summary disposition on the issue of class and collective action waivers in arbitration agreements. It changes nothing that this case also involves an issue of whether ISS’s arbitration agreement interferes with its employees’ ability to file charges

with the Board. Summary reversal is appropriate on this issue as well because ISS's agreement expressly preserves that right—and as this Court held in *Murphy Oil*, it would be unreasonable for an employee to read the agreement as precluding Board charges when it “says the opposite.” In short, there is no reason to waste time and money briefing foregone conclusions.

I.

On the issue of class and collective action waivers, the Board's argument is founded exclusively on delay. That's because this Court has repeatedly rejected the Board's position and has held that class and collective action waivers *do not* violate the Act.¹ Since the Court is bound to follow that authority in this and other related cases, the Board seeks to avoid summary reversal while it considers whether to seek Supreme Court review of *Murphy Oil*—a period of uncertainty the Board just extended for another thirty days. *See Opp.* at 3-4. This is improper and unfair. ISS should not be forced to wait on the relief that Fifth Circuit precedent demands simply because: (1) the Board *may* seek Supreme Court review in a separate case, (2) the Supreme Court *may* grant review in that case, and (3) the Supreme Court *may* address the issue and disagree with the Fifth Circuit—all of which must occur for the result in this case to be anything other than a reversal.

¹ *See D.R. Horton v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1016 (5th Cir. 2015); *Chesapeake Energy Corp v. NLRB*, 633 Fed. Appx. 613, 615 (5th Cir. Feb. 12, 2016).

A party in the Board's position—whether governmental agency or not—has no right to delay litigation simply because it hopes that its legal position will strengthen in the interim. This is especially true in cases like this one, where the overlapping litigation is a problem of the Board's own making. When this Court first rejected the Board's position on class and collective action waivers in *D.R. Horton*, the Board elected not to seek Supreme Court review. Instead, the Board continued issuing orders finding that class and collective action waivers violate the Act. Now that this Court has (unsurprisingly) followed its own precedent in *Murphy Oil*, *Chesapeake Energy*, and other cases, the Board is faced with the inevitable result of its enforcement decisions: summary reversal. It should not be permitted to use the speculative prospect of Supreme Court review to string along dozens of other cases that must be reversed under settled Fifth Circuit authority.

Indeed, this Court has rejected essentially identical delay requests in each of the recent cases granting summary disposition on this issue. *See On Assignment Staffing Servs., Inc. v. NLRB*, Case No. 15-60642 (5th Cir. June 6, 2016); *PJ Cheese Inc. v. NLRB*, Case No. 15-60610 (5th Cir. June 16, 2016); *24 Hour Fitness USA, Inc. v. NLRB*, Case No. 16-60005 (5th Cir. June 27, 2016); *Mastec Servs. Co. v. NLRB*, Case No. 16-60011 (5th Cir. July 11, 2016); *UnitedHealth Grp., Inc. v. NLRB*, Case No. 16-60122 (5th Cir. July 21, 2016); *S.F. Markets, LLC v. NLRB*, Case No. 16-60186 (5th Cir. July 26, 2016). While the Board may believe that the

best approach is to delay any decision in these cases pending Supreme Court review, this Court apparently does not. So regardless of whether the Board files a petition for writ of certiorari, summary reversal on the issue of class and collective action waivers is appropriate and consistent with recent Fifth Circuit practice.

II.

The result is the same on the second issue—whether ISS’s agreement interferes with its employees’ ability to file charges with the Board—though the Board’s delay argument on this point is slightly different. The Board claims that this issue “cannot be resolved simply by reference to *Murphy Oil*” and that full briefing on the merits is necessary. Opp. at 7-8. The Board is wrong on both counts. Given the clear guidance in *Murphy Oil* that an employee cannot reasonably construe an agreement to prohibit Board charges “when the agreement says the opposite,” summary reversal is appropriate even though ISS’s carve-out provision is not identical to the one in *Murphy Oil*. See 808 F.3d at 1020.

The Board’s opposition on this point seems to rest on a misconception about the summary disposition standard. This is not about whether the Court in *Murphy Oil* made a “blanket statement” about carve-out provisions in arbitration agreements. See Opp. at 5-6. Instead, the question is whether *Murphy Oil* demonstrates that “the position of one of the parties is clearly right as a matter of

law so that there can be no substantive question as to the outcome of the case.” *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).²

That’s exactly what *Murphy Oil* does here, regardless of semantic differences between the respective agreements. In *Murphy Oil*, the arbitration agreement provided that “nothing in this agreement precludes [employees] . . . from participating in proceedings to adjudicate unfair labor practice[] charges before the [Board].” *Murphy Oil*, 808 F.3d at 1019-20. In light of that recognition—and in only four sentences of analysis—the Court concluded that agreement did not interfere with the right to file Board charges because “it would be unreasonable for an employee to construe [the agreement] as prohibiting the filing of Board charges when the agreement says the opposite.” *Id.* at 1020.

So it should be here. ISS’s arbitration agreement similarly declares that “[r]egardless of any other terms of [the agreement], claims may be brought before and remedies awarded by . . . the National Labor Relations Board.” Motion, Ex. A at 1. Though the language of this provision differs from the one in *Murphy Oil*, the principle is identical—it would be unreasonable for an employee to read the agreement to preclude Board charges because the agreement “says the opposite.”

² The Board is incorrect to suggest that summary disposition involves “no substantive review.” Opp. at 5; see *Groendyke*, 406 F.2d at 1163 (“The fact that we term this a ‘summary’ reversal does not imply that the legal question presented was not thoroughly considered on its merits.”). Instead, this device simply exists for those cases that can be decided without “a traditional submission with all the trappings.” *Id.* at 1162.

Murphy Oil, 808 F.3d at 1020. While the Board contends that applying *Murphy Oil* requires a detailed, fact-specific review of ISS's agreement, there is no evidence that the Court in *Murphy Oil* required such an analysis to reach its conclusion. Instead, the Court simply cited the language of the carve-out provision, summarized the Board's arguments, and reached a (brief) common-sense conclusion about what that provision meant. *See id.* at 1019-20. The relevant language in ISS's agreement is before this Court, and the Board does not point to any other evidence that would be necessary to conduct this analysis. Particularly given the Court's straightforward conclusion in *Murphy Oil*, this Court has what it needs to grant summary reversal on this issue.³

III.

In conclusion, the outcome of both issues in this case is controlled by existing circuit authority that cannot be changed by a panel decision. Summary disposition exists for just this kind of case, and the parties should not be forced to incur the time and expense of briefing foregone conclusions. Further, it is inappropriate to delay this relief on the off chance that the Supreme Court reviews

³ Indeed, as the Board acknowledges in its August 22, 2016, letter brief, the Court recently granted summary reversal on this same issue in *Securitas Security Services, USA, Incorporated v. NLRB*, Case No. 16-60304 (5th Cir. Aug. 16, 2016). In so doing, the Court rejected almost all the same arguments the Board presses here to avoid summary disposition on this issue. The result should therefore be the same, regardless of whether the Board seeks partial reconsideration in *Securitas* because: (1) the Court's decision in *Securitas* is correct; and (2) as with the issue of class and collective action waivers, the Board has no right to use the reconsideration process in another case to keep this one in limbo.

and overturns *Murphy Oil*. ISS respectfully requests that the Court lift the stay in this case and summarily reverse the Board's April 7, 2016 Order and Decision.

Dated: August 24, 2016

Respectfully Submitted,

/s/ Laura O'Donnell

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2016, I electronically transmitted the attached document to the Clerk of the Court of the 5th Circuit Court of Appeals using the ECF System of the Court. The electronic case filing system sent a “Notice of Electronic Filing” to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Laura O'Donnell

Laura O' Donnell

ECF CERTIFICATION

I hereby certify (i) the required privacy redactions have been made pursuant to 5TH CIR. R. 25.2.13; (ii) the electronic submission is an exact copy of the paper document pursuant to 5TH CIR. R. 25.2.1; (iii) the document has been scanned for viruses using Symantec Endpoint Protection active scan and is free of viruses; and (iv) the paper document will be maintained for three years after the mandate or order closing the case issues, pursuant to 5TH CIR. R. 25.2.9.

/s/ Laura O'Donnell

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